

COPY

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF PITKIN
AND STATE OF COLORADO

Criminal Action No. C-1616

PEOPLE OF THE STATE OF COLORADO,)

Plaintiff,)

v.)

THEODORE ROBERT BUNDY,)

Defendant.)

REPORTER'S PARTIAL
TRANSCRIPT

BE IT REMEMBERED that on Friday, December 23,
1977, the same being a regular juridical day of the
December, 1977, Term of the District Court of the
Ninth Judicial District of the State of Colorado, the
above-entitled cause came on for trial before the
HONORABLE GEORGE LOHR, District Judge, presiding in the
District Court in and for the County of Pitkin, State
of Colorado.

APPEARANCES

For the People:

MILTON BLAKEY, Esquire
Deputy District Attorney,
Fourth Judicial District
Colorado Springs, Colorado

With the Defendant:

KEVIN O'REILLY, Esquire
P.O. Box 1635
Glenwood Springs, Colorado 81601

THEODORE R. Bundy, pro se.

* * * * *

The following proceedings were had and entered of record:

(Opening statement by the Court, ruling on motions and arguments were reported, but not herein transcribed pursuant to ordering counsel.)

THE COURT: All right. That motion will be denied.

I have rulings on some of the motions that were heard earlier, and rather than taking the time to wait for typing them up, I think it's important to get you the results now, and so I'm going to read these rulings into the record.

First, there is a Memorandum Opinion and Order with respect to the motion in Limine relating to the use of evidence of the Smith and DaRonch transactions.

"On September 6, 1977, defendant filed a Motion in Limine to exclude from presentation at the trial any evidence of transactions involving Carol DaRonch and Melissa Smith.

"A hearing was held on that motion and others beginning November 14, 1977, and continuing on November 21, 1977. Defendant represented himself and was assisted

by advisory counsel Kevin O'Reilly, Esquire, and Kenneth Dresner, Esquire. The People were represented by District Attorney Robert Russel, Esquire, and Deputy District Attorney Milton Blakey, Esquire, both of the Fourth Judicial District, each of whom has been appointed as a Deputy District Attorney in the Ninth Judicial District for the purpose of this case.

"It was stipulated that the evidence at the preliminary hearing could be considered as part of the evidence in the Motion in Limine, and that an offer of proof filed by the People on November 14, 1977, with respect to the Smith Transaction can be considered as part of the evidence on the Motion in Limine.

"The Court has considered the Motion in Limine, the evidence, the People's Memorandum of Law Concerning Admissibility of Similar Transactions and the People's Memorandum Concerning Admissibility of Similar Transactions (Factual Summary) as well as Defendant's Brief on the Admissibility of Two Alleged 'Similar Transactions' sought to be introduced in the present case. The Court also has considered the oral argument which was heard December 9, 1977.

"Upon consideration of those matters, the Court makes the following findings for the purpose of ruling on the Motion in Limine only and issues the following memo-

randum opinion.

"The general rule with respect to the use of evidence of alleged similar transactions in a criminal trial is stated in Warford, et al. v. People, 43 Colo. 107, 96 P. 556 (1908), at page 112:

'The general rule is, that evidence is not admissible which shows, or tends to show, that the accused has committed a crime wholly independent of the offense for which he is on trial. The reason for the rule is that no person shall be convicted of an offense by proving that he is guilty of another. Evidence of such character creates a prejudice in the minds of the jury against the accused, and the rule should, therefore, be strictly enforced in all cases where applicable.'

"There are exceptions to the general rule --" the quote was closed after "applicable."

"There are exceptions to the general rule. Although evidence of similar transactions cannot be used to show that he is likely to have committed the crime charged (Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959)), similar transactions sometimes are admissible in establishing particular elements of an offense. See Stull v. People, supra. In this case, the District Attorney seeks

to utilize such evidence to assist in proving that the defendant was the person who committed the offense charged, (i.e., that the modus operandi employed was so similar as to evidence that the same person committed the crime charged and the alleged similar transactions) and that the offense charged and the alleged similar transactions were part of a common plan, scheme or design. These purposes are directed to the elements of identity of the perpetrator and intent. In appropriate cases, evidence of similar transactions is admissible for such purposes. See McCormack on Evidence, Second Edition, Section 190; see People v. Hosier, 186 Colo. 116, 525 P.2d 1161 (1974); People v. Henderson, "blank "C.A.," blank, "559 P.2d 1108 (1977).

"Evidence of an alleged similar transaction is admissible only if it is first shown that the defendant was the actor (see People v. Hosier, supra) and that a substantial degree of similarity exists between the alleged similar transaction and the offense charged. Clews v. People, 151 Colo. 219, 377 P.2d 125 (1962); Webb v. People, 97 Colo. 262, 49 P.2d 381 (1935); People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974). Such matters need not be shown beyond a reasonable doubt, but must be shown by substantial evidence. See McCormack on Evidence, Second Edition, Section 190. There it is said at page 451:" quote,

"In the first place, it is clear that the

other crime, when it is found to be independently relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to defendant's connection therewith, but for the jury to be entitled to consider it there must, of course, be substantial evidence of these facts, and some courts have used the formula that it must be 'clear and convincing.' And it is believed that before the evidence is admitted at all, this factor of the substantial or unconvincing quality of the proof should be weighed in the balance.'

"Once it is shown by substantial evidence that the defendant was the actor and that substantial similarity exists, the Court must balance the relevance and probative value of the evidence of a similar transaction against the possible prejudice. This is a task requiring exercise of the Court's informed discretion. In People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974), it was said, at Page 51:

"The trial judge must weigh the degree to which the two transactions are similar, the bearing of the other transaction on the issues presented at the trial of the offense

charged, and the degree to which the jury would be prejudiced by the other transaction. Because of these varying considerations, the trial judge is allowed substantial discretion when he decides regarding the admissibility of such evidence.

Clews v. People, 151 Colo. 219, 377 P.2d 125 (1962); Perry v. People, 116 Colo. 440, 181 P.2d 439 (1947).'"

That closes the quote from People v. Ihme.

"In McCormack on Evidence, Second Edition, Section 190, at Page 452, it is said," quote,

"'. . . Courts are stricter in applying these standards of relevancy when the ultimate purpose of the state is to prove identity, or the doing by the accused of the criminal act charged than they are when the evidence is offered on the ultimate issue of knowledge, intent or other state of mind,'"

close quote.

"McCormack goes on to say at Page 453:" quote,

"'Accordingly, some of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeon-

holing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility,"

close quote.

"The Smith and DaRonch transactions must be analyzed against the foregoing legal framework.

"Comparison of Smith and Campbell transactions;
Connection of Defendant:

"Melissa Smith disappeared October 18, 1974. She was last seen in J.B.'s Restaurant in the metropolitan Salt Lake City area by two acquaintances about 10:30 p.m. on that date. Caryn Campbell disappeared January 12, 1975 about 8:00 p.m. from the Wildwood Inn, a lodge at Snowmass Resort in Pitkin County, Colorado.

"When Smith disappeared, she was 17 years old, five foot three inches tall and weighed approximately 100

pounds. She had an oval face and long, light brown hair, parted in the middle. When Campbell disappeared, she was 23 years old, five foot five inches tall and weighed approximately 100 pounds. She had an oval face and long brown hair, parted in the middle.

"Smith was wearing blue flared jeans, dark blue blouse containing small flower designs, and brown leather shoes. She may have been wearing a shirt jacket or blue parka-style overgarment. Campbell was wearing a blue flowered blouse, blue jeans with flare legs, brown boots and a heavy coat with wool collar when she disappeared.

"The manner of Melissa Smith's disappearance is unknown. She was not carrying her purse or any money when she left home. Her overnight bag, fully packed and ready for an overnight stay with a girl friend, was still at home. Her friend did not see her that night or thereafter. Melissa Smith took none of her personal clothing, jewelry or makeup, except what she was wearing. She had never run away from home or indicated any intentions of doing so. She was a responsible person who informed her family and friends of her actions, plans and whereabouts before leaving for any significant period of time. Melissa Smith went from her home to the Pepperoni Pizza Place about nine o'clock p.m. on the night of her disappearance. About 10:30 p.m. she was seen at J.B.'s Restaurant. Between 10:45 and 11:00 o'clock p.m. on October

18, Mr. and Mrs. Smith went to J.B.'s to find her, following the route she usually traveled. The route goes through poorly lit residential blocks and several vacant weed-filled lots. She sometimes hitchhiked part of the way. The manner of Campbell's disappearance is unknown. She left the lobby of the Wildwood Inn to go to her second-floor room to obtain a magazine, and disappeared. There were many occupants of the lodge at the time and no report of any outcry or disturbance was made notwithstanding extensive questioning of many of those occupants by law enforcement authorities.

"Melissa Smith's body was found on October 27, 1974 in the foothills of the Wasatch Mountains approximately 12 miles east of Salt Lake City. It was found about 500 to 600 yards up a side hill from a dead end street which is part of a new subdivision and the area is fairly mountainous, with heavy stands of pine and scrub oak. The entire side hill on which the body was found is covered with scrub oak about knee high except for a stand approximately seven to eight feet high where the body was located. Evidence with respect to the time of her death is conflicting and inconclusive. There is some evidence that several days elapsed between the date of her disappearance and the date of her death. A ligature, which appeared to be a man's sock, was found around her neck. The cause of death was strangulation. One strand of beads was also around her neck; it was one of the two strands she

was wearing as her jewelry at the time of her disappearance. She had a wound in her head and the amount of blood in the area was slight in reference to the magnitude of the head wound. Her skull was fractured. Cause of death was strangulation, although the head injuries were sufficient to have resulted in death eventually. The body was naked and no clothing was found in the area. None of Melissa Smith's clothing has ever been recovered.

"Caryn Campbell's body was found on February 15, 1975, in snow and brush off a back road near Snowmass Resort. The body was nude except for gold loop earrings. No clothing was found in the vicinity of the body. None of Campbell's clothing has ever been recovered. Campbell experienced a skull fracture and three significant scalp lacerations. The fracture of Campbell and that of Smith were very similar in location. The cause of Campbell's death was either exposure or the blow on the head or a combination of the two. The evidence is conflicting in that regard. Autopsy showed that Campbell's death had occurred within hours after her disappearance on January 12, 1975.

"Evidence indicates that neither Smith nor Campbell was acquainted with the defendant. Evidence was presented of lacerations in the left ear area of Campbell and under the chin of Smith, which were similar in nature. Evidence is conflicting as to whether the force of the blows to the head

were comparable or whether in Smith's case the force was more severe. Although the skull fractures and lacerations are consistent in each case with having been caused by the metal bar allegedly used in the DaRonch case, they are equally consistent with having been caused by other entirely dissimilar instruments. Each body has areas of bloodless abrasions. Neither showed evidence of defensive marks. The evidence was not substantial or convincing that any of these similarities were so unusual, either alone or taken together, as to indicate a common modus operandi. See People v. Antuck, 539 P.2d 43, a California case decided in 1975.

"Mustard seeds were found in Melissa Smith's hair --" That is -- there is a portion that comes first.

"There is evidence in the form of a cut in the genital area which is indicative of sexual assault in the case of Smith. Other evidence of sex in her case is inconclusive. Campbell's autopsy revealed evidence of a vaginal sex act, which is consistent with an act of sexual intercourse with her fiance which occurred less than 24 hours preceding her death.

"Mustard seeds were found in Melissa Smith's hair. They are not indigenous to the area in which the body was found but are common at lower elevations in the Salt Lake City area and are found in quantity in the vacant lots along the route Melissa usually walked from her house

to J.B.'s restaurant.

"The only link between the defendant and Smith is that a pubic hair was found in a Volkswagen confiscated from a person who had purchased that vehicle from the defendant. The People's expert has testified at the preliminary hearing that such hair exhibits the same microscopic characteristics as known pubic hairs of Melissa Smith. He has also testified that microscopic hair identification does not constitute a positive basis for personal identification and that no statistical data exists with respect to the incidence of such characteristics in the population of any area. Thus, he was unable to state the mathematical probability that hair samples having the same microscopic characteristics are from the same individual. He stated that it would be most unusual to find hairs of two persons of the same race, picked at random, to be so similar as to be indistinguishable on microscopic examination. The evidence strongly indicates that Melissa Smith was not in the vehicle after it was sold by defendant Bundy, although the purchaser was acquainted with Smith.

"Admissibility of Evidence of Smith Transaction:

"The evidence attempting to link defendant to the Smith transaction is highly inconclusive at best. The only tie is a single pubic hair found in a vehicle at one time owned by defendant. The People's expert witness testified

that such hair exhibits the same microscopic characteristics as known pubic hair of Melissa Smith but that microscopic hair examination does not constitute a positive basis for personal identification. No statistical data exists with respect to the incidence within any geographic area of hair characteristics identifiable by microscopic examination. Thus, the People's expert was unable to estimate the probability that the questioned hair sample came from Melissa Smith. There is nothing in the evidence to give any guidance as to the frequency within which the same microscopic characteristics are to be found because in reading -- in comparing a hair from a known source against the hair of another individual, except the People's expert's testimony that it would be most unusual, i.e., does this mean that it would occur once in ten, once in a hundred or once in ten million.

"Even if the questioned pubic hair could be positively linked to Melissa Smith, that indicates only that she was in the defendant's car at some time. Whether the defendant was in the car himself at that time would still be unknown. There is a further gap to be bridged between showing that Smith was at one time in the vehicle and showing that the defendant was responsible for her death.

"It is concluded that there is no substantial evidence to link defendant to the Smith transaction.

"It is also concluded that the Smith transaction

is not established to be so similar to the Campbell transaction as to be admissible to establish that the perpetrator was the same person. The points of similarity are neither numerous enough nor distinctive enough to establish the transaction as similar for such purpose.

"The important similarities are few. The girls were somewhat similar in physical appearance, especially in hair length and style. No significant similarities in clothing exist. Their bodies were found naked, except for jewelry, and no clothing of either was found. Each was struck one or more hard blows on the back of the head. Each experienced a skull fracture of the same part of the skull.

"The evidence does not establish how either came into the control of her killer. Melissa Smith was strangled, and a ligature was around her neck. No ligature was found on Caryn Campbell and the condition of the body made it impossible to determine whether or not she was strangled; there was nothing to indicate strangulation. Although the evidence is consistent with the use of the same implement to cause the head injuries, it is equally consistent with the use of different implements and of implements different in kind. The evidence is indicative of sexual assault with respect to Smith. There is no evidence establishing a sexual assault on Campbell, although sexual activity with her abductor cannot be ruled out as a possibility based upon the evidence.

"The locations of the occurrences are dissimilar. The four occurrences took place three months and five hundred miles apart.

"Where evidence is offered to show that the crimes are so nearly identical in method as to earmark them as the handiwork of the same person, 'The device used must be so unusual and distinctive as to be like a signature,'" close quote. "McCormack on Evidence, Second Edition, Section 190 at Page 449. Similarities of the Smith and Campbell transactions do not approach satisfaction of that standard.

"Comparison of DaRonch and Campbell transactions:
Connection of defendant:

"Carol DaRonch was abducted November 8, 1974, about seven o'clock p.m. from the Fashion Place Mall in Murray, Utah, in the Salt Lake City metropolitan area. Caryn Campbell disappeared January 12, 1975, about eight o'clock p.m., from the Wildwood Inn, a lodge at Snowmass Resort, Pitkin County, Colorado.

"DaRonch was 18 years of age at the time of her abduction. She was five feet seven inches tall and weighed 108 pounds. She wore her long brown hair parted in the middle. Campbell was 23 years of age at the time of her disappearance. She was five feet five inches tall and weighed 100 pounds. She wore her long brown hair parted in the middle.

"DaRonch wore blue denim levis, a light blue shirt with a hood, blue knee socks, loafers and a short leather coat. Campbell wore a blue flowered blouse, blue jeans with flare legs, brown boots and a heavy wool coat with a collar.

"A ruse was employed to induce DaRonch to enter her abductor's car. Her abductor posed as a policeman investigating an attempted break-in of DaRonch's car and convinced her to accompany him, purportedly to go to the police station to file a complaint. Her abductor exhibited a badge when she asked for identification. The manner of Campbell's disappearance is unknown. She left the lobby of the Wildwood Inn to go to her second-floor room to obtain a magazine and disappeared. There were many occupants of the lodge at the time and no report of any outcry or disturbance was made, notwithstanding extensive questioning of many of those occupants by law enforcement authorities.

"DaRonch escaped from her abductor. When she first got in the vehicle, he asked her to fasten her seat belt, but she declined. After driving a few blocks, he pulled the car to the side of the road without notice, running the right wheels toward the curb. He placed a handcuff on one of her wrists and unsuccessfully tried to place the other cuff on the other wrist. She struggled. He pulled a gun and threatened to blow her head off. She continued to struggle and got out the passenger door. He maintained a hold on her arm

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and followed her outside the vehicle. There the struggle continued. He tried to strike her head with a metal bar. She was able to prevent the blow. She broke free and escaped in a passing car. When she entered the passing car, her abductor returned to his own car and sped away.

"Campbell's body was found on February 17, 1975 off a back road near Snowmass Resort. Autopsy revealed she had experienced a skull fracture and three significant scalp lacerations. Her death occurred within hours after her disappearance on January 12, 1975.

"Defendant was unacquainted with DaRonch prior to her abduction. There is no evidence to indicate that defendant was acquainted with Campbell.

"Defendant is connected to the DaRonch transaction by substantial evidence. DaRonch positively identified defendant as her abductor and identified his vehicle as the vehicle in which she was abducted. This evidence is substantial even though its reliability is disputed.

"Admissibility of Evidence of DaRonch Transaction:

"There is substantial evidence of the connection of the defendant to the DaRonch transaction.

"Whether the transactions are sufficiently similar to permit the jury to consider the DaRonch transaction is dependent upon the purpose for which it is offered and the state of the record at the time it is offered.

"The important similarities are even fewer than in the Smith case. The hairstyle of the girls was similar. Each in some manner left without outcry. The metal bar used to assault DaRonch is consistent with the wounds on Campbell's head and body, but those wounds are equally consistent with the use of a different instrument and of an instrument different in kind.

"There is no showing of similarity on several of the most important aspects of the two transactions. Handcuffs and a gun were used in the DaRonch transaction. There is no indication of the use of either in the Campbell transaction. DaRonch's abductor was alone. The only evidence indicating defendant's presence in Pitkin County on the evening in question is provided by witness Lizbeth Harter. She places him in the company of another man, both being dressed in distinctive non-skiing attire, which she found to be inappropriate for the weather and incongruous for the setting.

"The locations of the occurrences are dissimilar. The occurrences took place two months and five hundred miles apart. The similarities are far from being," quote, "so unusual and distinctive as to be like a signature," close quote. "McCormack on Evidence, Second Edition, Section 190 at Page 449. Evidence of the DaRonch transaction cannot be received for the purpose of showing it to be so similar to

the Campbell transaction that the perpetrator must have been the same in each case.

"The DaRonch transaction could have probative value on the issues of plan, scheme, design and intent. For this purpose, the essential similarities appropriately can be characterized more broadly, i.e., in the DaRonch incident a young girl was assaulted and an attempt was made to strike her on the head with a metal bar. DaRonch was a stranger to her abductor. In the Campbell incident a young girl was assaulted and struck on the head with, or struck her head upon an object. She was a stranger to the defendant. If evidence of the DaRonch transaction is offered against the background of independent, substantial evidence placing defendant in Campbell's vicinity on the night in question, the evidence of the DaRonch transaction may be admissible to establish criminal plan, scheme, design and intent, as contrasted with non-criminal purpose, dependent upon the evidence of record at the time. Evidence of the DaRonch transaction would be highly prejudicial to the defendant. The need for use of evidence of the DaRonch transaction to show plan, scheme, design and intent must be balanced against its prejudicial effect. It is concluded that such balancing should take place at trial against the evidentiary background existing at the time the evidence is offered.

"Based upon the foregoing opinion, it is ordered

that the

that the motion to exclude from presentation at trial any evidence of the transaction involving Melissa Smith is granted; and the Court declines to rule in advance of trial on the motion to exclude from presentation at trial evidence of the transaction involving Carol DaRonch.

(Further rulings on motions given by the Court and reported but not transcribed pursuant to direction of ordering counsel.)

* * * * *

REPORTER'S CERTIFICATE

The above and foregoing partial transcript is a true and complete transcription of my stenotype notes taken in my capacity as appointed Official Reporter at the time and place above set forth.

Dated at Glenwood Springs, Colorado, January 8, 1978.

Shorthand Reporter

